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No. 86-973

Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**  
October Term, 1986

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SOUTH RANCH OIL COMPANY, INC.,  
*Petitioner,*  
vs.

SEISMIC INTERNATIONAL RESEARCH CORP.,  
*Respondent.*

— 0 —  
On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

— 0 —  
**RESPONDENT'S BRIEF IN OPPOSITION**  
— 0 —

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## RESTATEMENT OF QUESTION

Did the Court of Appeals make a fundamental legal or factual error when it upheld the trial court's refusal to instruct on South Ranch's claim that Seismic had induced South Ranch's employee to breach his fiduciary duty to South Ranch? South Ranch made no claim that the trial Court had abused its discretion in denying this instruction when it was filed untimely. South Ranch did not claim that the trial Court had misapplied Local Rule 14 in denying South Ranch's motion to add this tort claim instruction that Seismic induced South Ranch's employee to breach his fiduciary duty to South Ranch. South Ranch failed to submit a timely instruction and its motion to add this tort claim instruction was denied because of South Ranch's failure to adhere to Local Rule 14.

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## STATEMENT OF THE CASE

Respondent, Seismic International Research Corp., (hereinafter referred to as SI) sued the petitioner, South Ranch Oil Company, Inc., (hereinafter referred to as SROC) for SROC's failure to pay for certain seismological services rendered by SI in connection with oil and gas exploration. SROC counterclaimed for nonperformance. In an amended counterclaim, SROC alleged that SI had made an undisclosed payment to Norman Stafford, SROC's employee, by paying him a \$28,000.00 sales commission. Norman Stafford was one of SROC's employees that was responsible for monitoring the performance of SI's work and approving payment to SI. SROC claimed that there was a joint venture between SROC and SI and/or Brasel (the president of SI) which created a fiduciary relationship between them which was breached by SI and/or Brasel.

At trial, SROC was able to argue that SI had breached its duty to deal in good faith by paying this sales commission to Norman Stafford. The jury found in favor of SI and against SROC on this claim.

In its Petition, SROC argues that "A jury question was clearly presented on the counterclaim under Section 312 of the Restatement of Agency and the common law of fiduciary duty." Contrary to SROC's contention, the trial Court did not direct a verdict against SROC on this claim, but rather found that the evidence presented at trial was insufficient to submit this claim to the jury.

On appeal, the Tenth Circuit affirmed the refusal to instruct on SROC's counterclaim because SROC failed to submit this tort claim instruction to the Court three (3)

days before trial, as required by the Order at Pretrial, not because Local Rule 14 required the submission of these instructions three (3) days prior to trial, as SROC would have this Court believe. Rather, it was SROC's belated motion to add the tort claim instructions that was denied because of SROC's failure to adhere to Local Rule 14.

In its Petition, SROC maintains that it filed its proposed instructions on the inducing breach of fiduciary duty claim on March 8, 1983, three (3) weeks before the beginning of the trial on March 28. (See p. 6). However, even a cursory review of those instructions which may be found at Appendix D of SROC's Petition shows that those instructions pertain to an alleged breach of fiduciary duties which purportedly arose because of an alleged joint venture between SI and SROC, and to claims of interference with business relations.

SROC did not submit an instruction based on SI's payment to Stafford "under Section 312 of the Restatement of Agency and the common law of fiduciary duty" on its claim that SI had induced Norman Stafford to breach any fiduciary duty which he owed to SROC.<sup>1</sup>

Accordingly, the Court of Appeals properly ruled:

SROC strenuously argues that it presented sufficient evidence for the court to instruct on its tort claim. But it does not argue that the court misapplied Local Rule 14 [denying SROC's *motion* to add the tort claim instructions] or abuse its discretion in denying the instructions because they were filed late [in viola-

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<sup>1</sup> Section 312 of the Restatement of Agency provides:

"A person who, without being privileged to do so, intentionally causes . . . an agent to violate a duty to his principal is subject to liability to the principal."

tion of the Order at Pretrial]. Indeed, no mention of Local Rule 14 was made in the briefs. Counsel's failure to focus on the reasons the trial court denied the required instructions leaves us without a basis for assigning error to the trial court's decision. (matter in brackets ours)

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### **WRIT SHOULD NOT BE GRANTED**

#### **I. Circuit Court Properly Found That No Timely Instruction was Submitted by SROC on Its Claim for Tortious Interference With a Fiduciary Relationship.**

Timely instructions were filed by SROC on March 8, 1983. Additional instructions, not supplemental instructions, were filed by SROC on March 28, 1983, the first day of trial, and were properly refused by the trial Court as untimely.

SROC had put forward a claim that there was a joint venture agreement between SROC and SI with regard to work done by SI in Wyoming. On the basis of this alleged joint venture, SROC argued that SI had a fiduciary relationship with SROC. The instructions that SROC has attached to its brief (A-18 through A-21) were offered on March 8, 1983. These instructions refer to a breach of the alleged joint venture fiduciary duty and to tortious interference with business relations but not to inducing orman Stafford to breach his fiduciary relationship with his employer — different claims requiring different instructions.



It is disingenuous, at this late date, for SROC to state that these instructions, which were offered on its claim of a violation of fiduciary relations in a joint venture, now apply to SROC's claim that SI induced Norman Stafford to breach his fiduciary duty to SROC.

## **II. SROC's Complaint Does Not Justify This Court's Exercise of Its Supervisory Power.**

The Court of Appeals properly denied SROC's appeal from the trial Court. SROC in its brief correctly states that the issues in this case do not at first blush conjure up the spector of certiorari or seem worthy of this Court's attention. Supreme Court Rule 17 "Considerations Governing Review On Certiorari" sets forth the special and important reasons and circumstances when the Supreme Court will exercise its judicial discretion and grant certiorari.

SROC seeks to come under the provision in paragraph 1(a):

"When the Federal Court of Appeals \*\*\* has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

Discussion of the application of this particular rule is found in Volume 13, Moore's Federal Practice, Second Edition, 817.27, "Departure from Usual Court of Judicial Proceedings; Court's Power of Supervision." It is there stated:

"The Supreme Court stands at the apex of the federal judicial systems. Besides its duty to decide cases within its original and appellate jurisdiction, the Court is vested with various supervisory tasks. It promul-

gates rules of practice and procedure for the lower federal courts, and through the Judicial Conference of the United States, monitors the operation of federal courts and makes recommendations for improvement of these operations. Rule 17 recognizes an additional responsibility—to ensure that the courts of appeals stay within the boundaries of ‘the accepted and usual course of judicial proceedings.’ If a court of appeals has strayed too far from this course, the Supreme Court may grant certiorari to correct the situation. And this is true whether the court of appeals itself has over-stepped the boundaries of accepted procedure, or has ‘sanctioned such a departure by a lower court.’ ”

As examples of the application of this Rule, certain cases were cited by Moore. For example, in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), certiorari was granted to review a removed case that the District Court had remanded to the State Court. The District Court’s sole ground for remand was that its over-burdened docket would unjustly delay going to trial. The Supreme Court granted certiorari. This is a clear case of a departure from the accepted and usual course of judicial proceedings.

In *Hanna v. Plumer*, 380 U.S. 518 (1964), the question raised was whether service of process should be made in a manner prescribed by Federal Rules of Civil Procedure or by the state law of Massachusetts. The Supreme Court granted certiorari because of the threat to the goal of uniformity of federal procedure posed by the decision below. Again, a situation where the Supreme Court is interested in uniformity of procedure throughout the judicial system and it granted certiorari.

In *McNabb v. United States*, 318 U.S. 332 (1943), the question was presented of admissibility against persons of a crime of statements obtained by secret interrogation. The Supreme Court granted certiorari and stated at 341:

“The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts (cases cited) this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions.”

Again, the Supreme Court granted certiorari in the exercise of its power of supervision.

In *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), the Supreme Court granted certiorari because the trial court had decided a constitutional question before considering whether statutory grounds might be dispositive. This was a violation of regularly accepted procedure.

All the cases cited by Moore pursuant to Rule 17.1.(a) were concerned with such departures from regular procedure by a lower court as to call for an exercise of the Supreme Court's power of supervision.

The cases cited by SROC in its brief are not in point. They do not deal with the exercise of the Supreme Court's power of supervision of departure by the lower courts from accepted and usual courses of judicial procedure but rather with the grounds set forth in Rule 17.1.(c).

In *Oregon v. Mathiason*, 429 U.S. 492 (1977), a police officer had called a suspect to the police station, but had

not arrested him, and had obtained a confession from him without first giving a Miranda warning. The lower court held that the confession was inadmissible because obtained in a coercive environment. On certiorari, the lower court was reversed on the ground that the man was not arrested, that this was not a "custodial interrogation" and that Miranda did not apply. In this case, certiorari was granted under subparagraph (c) of Rule 17 and the Supreme Court was not exercising its power of supervision.

In *Chase Manhattan Bank v. South Acres Development Co.*, 434 U.S. 236 (1978), the question presented was whether Congress had authorized the United States District Court of Guam to exercise diversity jurisdiction. Certiorari was granted and the Supreme Court construed the statute granting Guam jurisdiction of a District Court of the United States. The Supreme Court found that it did not encompass diversity jurisdiction. Again, decided under subparagraph (c) of Rule 17, being an important question of Federal law which should be settled by the Supreme Court. Again, the case not in point.

In *United States v. Woodward*, 469 U.S. 105 (1985), the question was whether a defendant, convicted of both false statement and violation of currency reporting statutes, had been subjected to double jeopardy. The Supreme Court construed the two federal statutes and held no double jeopardy involved. Again, decided under subparagraph (c) of Rule 17 and not in point.

*Smith v. Illinois*, 469 U.S. 91 (1985), the question presented was whether an accused had properly requested counsel in accordance with Miranda rule. The Supreme Court held that the request of accused was not ambiguous

and that any information obtained after that request could not be used against him. Again, the Supreme Court was applying subparagraph (c) of Rule 17.

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## DISCUSSION

### III. The Court Should Exercise Its Judicial Discretion and Deny Certiorari.

SROC petitions this Court for the issuance of a Writ of Certiorari on the ground that the Court of Appeals made a fundamental legal or factual mistake. Yet, when one gets past the rhetoric of the petitioner and looks at the record, it is clear that the Tenth Circuit made no such mistake.

It would have been proper for the Court of Appeals to have affirmed the decision of the trial Court's refusal to instruct on SROC's counterclaim that SI had induced Stafford to breach his fiduciary obligations based on insufficiency of evidence. The Tenth Circuit was equally correct in affirming the trial Court on the ground that SROC failed to file appropriate jury instructions on this counterclaim in the time required by the Order on Pretrial and that SROC's motion to add the tort claim instructions on the day the trial began was properly denied because of SROC's failure to adhere to Local Rule 14.

**CONCLUSION**

For each of the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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